THE LAW REPORTER.

JULY, 1841.

REMARKABLE TRIALS. — No. II.

CASE OF THOMAS OLIVER SELFRIDGE.

On the fourth day of August, 1806, Charles Austin, a student in Harvard University, was shot dead on the public exchange in Boston, by Thomas O. Selfridge, Esq., a member of the Suffolk bar. Mr. Selfridge was arrested on the same day, and committed to prison to take his trial for murder before the supreme judicial court. In December following, the grand jury, of which Thomas H. Perkins was foreman, having been very carefully charged by Mr. Chief Justice Parsons on the law of homicide, returned into court an indictment for manslaughter, to which, on his arraignment, the prisoner pleaded not guilty. He was then admitted to bail in the sum of two thousand dollars for his appearance from day to day; and the trial commenced on December 23, 1806, before Mr. Justice (afterwards Mr. Chief Justice) Parker. The cause was conducted for the Commonwealth by James Sullivan, attorney general, and Daniel Davis, solicitor general; and for the defendant by Christopher Gore and Samuel Dexter.

The unfortunate occurrence which was the occasion of this trial, arose out of excited political feeling, and a jealousy on the part of the accused, of his professional reputation, which, he thought, had been impugned by the father of the deceased. The original causes of the difficulty were these: One Eben Eager had been employed by a committee, of which Benjamin Austin was chairman, to provide a dinner on Copp's Hill for a democratic celebration on the 4th of July. There being some difficulty in the settlement of the bill, Mr.

Selfridge, at the request of Mr. Eager, commenced a suit. The matter was subsequently settled, but Mr. Selfridge understanding that Mr. Austin had made some reflections upon his professional character, sent to him a note by a friend in which he said:—

You have to various persons, and at various times and places, alleged, "that I sought Mr. Eager, and solicited him to institute a suit against the committee (of which you were chairman) who provided the public dinner on Copp's Hill, on the fourth of July," or language of similar import. As the allegation is utterly false, and if believed, highly derogatory to any gentleman in his professional pursuits, who conducts with fidelity to his clients, integrity to the courts, and with honor to the bar; you will have the goodness to do me the justice, forthwith, to enter your protest against the falsehood, and furnish me with the means of giving the same degree of publicity to its retraction, that you have probably given to its propagation. I had hoped the mention of this subject to you yesterday, would have spared me the trouble of this demand; that twenty-four hours would have enabled you, without difficulty, to have obtained correct information, as to the fact; and that a just sense of propriety would have led you to make voluntary reparation, where you had been the instrument of injustice:—The contrary, however, impresses me with the idea, that you intended a wanton injury from the beginning, which I never will receive from any man with impunity.

The result of this communication not being satisfactory to Mr. Selfridge, he sent another note to Mr. Austin by the same friend, as follows:—

Sir,—The declarations you have made to Mr. Welsh are jesuitically false, and your concession wholly unsatisfactory.

You acknowledge to have spread a base falsehood, against my professional reputation. Two alternatives, therefore, present themselves to you; either give me the author's name; or assume it yourself. You call the author a gentleman, and probably a friend. He is in grain a liar and a scoundrel. If you assume the falsehood yourself to screen your friend, you must acknowledge it under your own hand, and give me the means of vindicating myself against the effect of your aspersion. A man, who has been guilty of so gross a violation of truth and honor, as to fabricate the story you have propagated, I will not trust; he must give me some better pledge than his word, for present indemnity, and future security. The positions I have taken, are too obviously just to admit of any illustration, and there is no ingenuous mind would revolt from a compliance with my requisitions.

This communication, like the other, being attended with no satisfactory result, Mr. Selfridge caused the following advertisement to be inserted in the Boston Gazette:—

"Austin Posted."

Benjamin Austin, loan officer, having acknowledged that he has circulated an infamous falsehood concerning my professional conduct, in a certain cause, and having refused to give the satisfaction due to a gentleman in similar cases—I hereby publish said Austin as a coward, a liar, and a scoundrel; and if said Austin has the effrontery to deny any part of the charge, he shall be silenced by the most irrefragable proof. Thomas O. Selfridge.

Boston, 4th August.

P. S. The various Editors in the United States are requested to insert the above notice in their journals, and their bills shall be paid to their respective agents in this town.

Mr. Austin obtained knowledge that he was to be posted, and published in the Independent Chronicle of the same morning, the following note:—

Considering it derogatory to enter into a newspaper controversy with one T. O. Selfridge, in reply to his insolent and false publication in the Gazette of this day; if any gentleman is desirous to know the facts, on which his impertinence is founded, any information will be given by me on the subject.

Boston, August 4. BENJAMIN AUSTIN.

☞ *Those who publish Selfridge's statement, are requested to insert the above, and they shall be paid on presenting their bills.*

On the morning that these advertisements appeared, there was a great deal of excitement in the city, and a general expectation that there would be a personal collision between the parties. Mr. Selfridge himself was informed by a friend, on that morning, that he would be attacked by some one, and he gave the witness to understand that he had been previously notified, or was ready; and when another friend asked him how he and Austin came on, he smiled and said he understood Austin had hired or procured some one or some bully (the witness did not recollect which expression was used) to attack him. This was a few moments before the encounter took place.

At about one o'clock in the afternoon, Mr. Selfridge left his office on the north side of the old state house, and proceeded leisurly down State street towards Suffolk buildings, on the corner of Congress street. When he had arrived about opposite to what was then called Half Court square, now Congress square, and was nearly in the middle of the street, Mr. Charles Austin, who was standing on the sidewalk, before Townsend's shop, between Congress street and Half Court square, advanced towards him with a walking stick in his hand, with which he gave Mr. Selfridge several blows upon the head. As the first or second blow was descending, the latter fired a pistol, and Mr. Austin expired in a few moments, although he struck several blows after he was shot. The ball entered his body a little below the left pap; its course was oblique and diagonal with the trunk of the body, inclining upwards towards the left side; it passed through the lungs, but not the heart, for it lodged above it.

There was some discrepancy between the witnesses at the trial as to whether a blow was struck before the pistol was fired. John M. Lane testified, that he was standing at the door of his shop on the north side of State street, between Wilson's lane and Exchange lane, (now Exchange street,) looking across the street, and there saw the defendant standing on the brick pavement. His face was towards the witness; young Mr. Austin was standing in front of the defendant. The defendant stood with his arms folded, or rather crossed horizontally, the right arm being uppermost, and in that position he fired the pistol. The deceased turned round instantly and gave the defendant several strokes before he fell.[1] Edward Howe testified, that in passing

[1] This witness was evidently mistaken in several statements, and was directly contradicted by Dudley Pickman, who testified, that he was in Lane's shop at the time, and Lane was sitting within the shop. *After the pistol shot was heard* Lane got up and went to the door and the witness followed him. Two other witnesses, however, testified that Lane was standing at the street door when the pistol was fired.

from Townsend's shop to the east end of the old state house he met Mr. Selfridge about two rods from Townsend's shop. He had on a frock coat and his hands were behind him. After passing on six or eight steps the witness heard a loud talking behind him. He immediately turned and the first thing he saw was Mr. Selfridge's hand with a pistol in it, the pistol was immediately discharged. The instant *afterwards* he saw the person shot at *step from the side walk* and strike Mr. Selfridge several very heavy blows on the head. Ichabod Frost testified, that he was standing opposite Mr. Townsend's shop, and hearing the report of a pistol, turned his eyes and saw a smoke; at that instant the deceased was *stepping from the side walk* with his stick up.

These were witnesses called by the government. The witnesses called by the defendant gave a different statement. John Bailey was at work in Mr. Townsend's shop. He saw Charles Austin pass down the street, and afterwards saw him pass up; he returned and took his stand directly in front of the shop. He had a stick in his hand of an unusual size. Witness soon afterwards saw the defendant passing down the street; he had his right hand in his pocket, his left hanging down. When Mr. Selfridge first came in sight the deceased was standing on the side pavement in front of the shop in conversation with Fales, a college friend, and playing with his cane. The moment the defendant caught his eye, he left Fales, and stepped off the brick pavement into the street. He moved with a quick pace, and while going shifted his cane from his left to his right hand. After he had got off the pavement, he turned and went towards the defendant with his cane raised up. They met about seventeen paces from the place the deceased had left. The deceased held the cane by the upper or largest end. The cane was uplifted and actually descending to give a blow at the time the pistol was discharged. The blow was not struck till after the pistol was fired. Zadock French was near Townsend's shop. He saw Mr. Selfridge going from the north-east corner of the old state house towards the Branch Bank (situated between Congress and Kilby streets, a little beyond Suffolk buildings.) He walked very deliberately with his hands behind him or under his coat. When opposite the witness, he was a little south of the middle of the street. All at once, he turned or wheeled towards the witness. At the same instant, Charles Austin stept off from the brick pavement and walked with a very quick step towards him, having his cane raised. Mr. Selfridge, as he turned towards the witness, presented a pistol as if to defend himself. It appeared to the witness that Austin's breast went against the muzzle of the pistol. Austin struck the defendant a blow on the head and the pistol was fired at *the same instant*. Richard Edwards was standing with Mr. French. He saw Mr. Selfridge passing slowly in the direction of the Branch Bank. Immediately young Austin passed from behind witness towards the middle of the street. By the time witness had turned, Mr.

Austin had got nearly to the middle of the street, and he saw Mr. Selfridge immediately before him, with his arm extended and a pistol in his hand. Mr. Austin had a cane in his hand, and at the instant the pistol was discharged, witness saw the cane elevated, but he was not able to say whether it was descending to strike a blow, or recovering from striking one. After the pistol was discharged, the deceased struck several blows with the cane. John Erving saw young Austin with his cane raised moving at a quick pace towards Mr. Selfridge, who had his left arm lifted as if to parry a blow; he took a pistol from his right hand pocket and fired under his arm. The first blow and the firing of the pistol seemed to be at the same instant. Lewis Glover testified, that when the deceased came up to Mr. Selfridge he struck him on his hat; while he was aiming the *second* blow, Mr. Selfridge took his hands from behind him, presented a pistol and fired it. The witness said he stood within fifteen feet of the parties and kept his eye steadily upon them. He was confident there was one blow before the pistol was discharged and that it was a violent one, sufficient, he should believe, to knock a man down who had no hat on. Joseph Wiggin saw Mr. Selfridge coming down the street and turned round to see if Austin had moved from his place and found he had. At that moment the witness heard a sound as of the stroke of a stick on a coat. Casting his eye round, he then saw Mr. Selfridge present his pistol, stepping back one step and fire.

It appeared, that young Austin was about eighteen years old, and very much superior to Mr. Selfridge in personal strength. He usually carried a rattan, but on the morning of his death, he purchased a heavy hickory cane; asked if it was a strong one and "would stand a good lick." A witness, who sold him the cane, said he had sold him canes for six months, about once a week, and he had always purchased small bamboos. Mr. Austin, senior, testified however, that his son had a cane at home twice as large as the one he struck Mr. Selfridge with, although he usually carried a small one.

It was in evidence, that Mr. Selfridge was of a very slender and delicate constitution, which his appearance indicated, and he had been noted for it when in college, never being able to engage in the athletic exercises or amusements peculiar to collegians. It was also testified, that Mr. Austin, senior, said a short time before the affray on the same day, that "he should not meddle with Selfridge himself, but some person upon a footing should take him in hand," and one of Mr. Selfridge's friends informed him, as we have before stated, that he was to be attacked by a bully hired for the purpose. Mr. Austin, however, denied on oath explicitly, that he ever had any intention of inflicting personal injury on Mr. Selfridge, or of hiring any one to do it. "I appeal to God," said he, when questioned upon this point, "he would have passed me as safely as he stands at your bar." The evidence of Lemuel Shaw, now chief justice of Massachusetts, who occupied the same office with Mr. Selfridge, was offered to show

that Mr. Selfridge went on 'change that day on business. It appeared that Mr. Selfridge received a dangerous wound from Mr. Charles Austin at the time of the affray. Dr. Warren was called to him in the evening and found a large contusion on his forehead about the middle of it; it was three inches in length and one in depth. The blow must have been given, the witness thought, when the hat was on. The hat was produced in court and found very much bruised.

Such were the prominent facts as they appeared in the evidence at the trial. The principal ground taken in the defence was, that the killing was necessary in self defence; that the defendant was in such imminent danger of being killed, or suffering other enormous bodily harm, that he had no reasonable prospect of escaping, but by killing the assailant. The counsel for the defendant, in commenting on the evidence, contended, that Mr. Selfridge went on the exchange about his lawful business, and without any design of engaging in an affray; that he was in the practice of carrying pistols, and that it was uncertain whether he took the weapon in his pocket in consequence of expecting an attack; that if he did, he had a right so to do, provided he made no unlawful use of it; that the attack was so violent and with so dangerous a weapon, that he was in imminent danger; that it was so sudden, and himself so feeble, that retreat would have been attended with extreme hazard; that the pistol was not discharged until it was certain that none would interfere for his relief, and that blows, which perhaps might kill him, and probably would fracture his skull, were inevitable in any other way, and that the previous quarrel with the father of the deceased, if it could be considered as affecting the cause, arose from the misbehaviour of old Mr. Austin, and that the defendant had been greatly injured in that affair.

Mr. Justice Parker, in charging the jury, laid down the general proposition, that when a man in the lawful pursuit of his business, is attacked by another, and, from the nature of the attack, there is reasonable ground to believe that there is a design to destroy his life, or commit any felony upon his person, the killing the assailant will be excusable homicide, although it should afterwards appear that no felony was intended. The jury were also instructed, that unless the defendant had proved to them that no means of saving his life, or his person from the great bodily harm which was apparently intended by the deceased against him, except killing his adversary, were in his power — he had been guilty of manslaughter, notwithstanding they might believe with the grand jury who found the bill, that the case did not present the least evidence of malice or premeditated design in the defendant to kill the deceased or any other person.

The court adjourned at 2 o'clock P. M., and came in at 4 P. M., when the jury returned a verdict of not guilty. It was said that they agreed in fifteen minutes.

Thus terminated a trial which was probably attended with greater

excitement than any other which ever occurred in this country. It is almost impossible for the present generation to comprehend the deep political feeling of that day, or to fully appreciate the bitterness and acrimony which existed between the two great political parties. The circumstance of such a death of one of the family of a leading politician was well calculated to excite this feeling to an intense degree. Accordingly, the newspaper press in all parts of the country was filled with comments upon the matter, and little regard was often paid to truth or decency in these ebullitions of political partisans.[1]

The case was conducted with uncommon ability by all engaged in it; and notwithstanding the great excitement against the defendant, he had the benefit of a most impartial trial. His able counsel managed the defence with prudence as well as ability. The closing argument of Mr. Dexter, in particular, was characterized by all the clearness, eloquence and brilliancy of that great lawyer; it was also remarkable for its propriety and fitness for the occasion. Evidently aware of the excited state of political feeling, which might be supposed to affect the jury as well as the bystanders, he proceeded in the defence with great caution and kept steadily in view the object which the lawyer ought always to consider paramount to all other considerations of mere feeling — the welfare of his client. In no instance did he forget that he was to restrain all political feeling, if any he had; unless, indeed, he may be supposed to have done so, when, in commenting upon the first publication in the Boston Gazette by Mr. Selfridge, he made a most cutting and terribly severe description, which no one failed to apply to Mr. Benjamin Austin, although Mr. Dexter disclaimed the intention of making any personal application of it.[2] "Suppose," said he, "a man should have established his

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[1] Mr. Selfridge being a federalist, some of the democratic newspapers made the most of this affair. Mr. Benjamin Austin, commonly called at that time *Honestus*, was the reputed editor of, or a principal writer for, the Independent Chronicle. That paper entered into this matter with great zeal and animation, and allusions to it were found in its columns long after the public excitement had died away. Before the trial took place, it contained most bitter and inflammatory appeals to the popular mind; and after the acquittal of the accused, the court, jury and counsel came in for a share of abuse. The charge of Chief Justice Parsons to the grand jury, which consisted principally of extracts from the old writers on criminal law, was much and bitterly complained of. The course of this paper, although not surprizing under the circumstances, was consistent neither with justice, propriety or a just regard for the laws and institutions of the country.

[2] This argument was reported in the Columbian Centinel soon after the trial, and the reporter thus speaks of it: "When the English language shall be numbered with the dead, and our orators, and illustrious literary characters become classics to posterity, this speech will rank, for both reason and rhetoric, among the first forensic efforts of New England." *Per contra*, the next Chronicle says: "The speech is a poor, feeble attempt at the sublime, arrayed in the ridiculous garb of bombastic *bathos!* It is the feather of a goose, absurdly intended to be inserted in the pinion of an eagle."

The trial was taken in short-hand by T. Lloyd, Esq., reporter of the debates in congress, and George Caines, Esq., formerly reporter of New York; and was sanctioned by the court and the reporter of the State. Mr. Dexter, however, had the advantage of reporting his own speech. The Chronicle of February 5, 1807, says: "The trial

reputation as a common slanderer and calumniator, by libelling the most virtuous and eminent characters of his country, from Washington and Adams, down through the whole list of American patriots; suppose such a one to have stood for twenty years in the kennel, and thrown mud at every well dressed passenger; suppose him to have published libels, 'till his style of defamation has become as notorious as his face, would not every one say, that such conduct was some excuse for bespattering him in turn?"

After his trial Mr. Selfridge published a statement[1] of the circumstances attending the case, including a defence of his conduct; in which he considers the controversy between himself and Mr. Austin as entirely personal, and complains that it had been converted into a political affair. He then examines the charges, which, he contends, Mr. Austin had made against him, and which, if true, would forever disgrace him as a lawyer. In relation to the catastrophe in State street, he says he expected an attack on that day, which induced him, through the day, to keep his pistols in his pockets. While passing down State street, his hands being behind him, on the outside of his coat, his attention was arrested, by the rapid and furious approach of the deceased, with a large cane uplifted. He instantly half wheeled, and faced him; and with a mere glance, observed, that his whole visage denoted the most desperate intentions. Instantly he seized with his right hand, the pistol in his right side pocket, which was guarded and upon half-cock, but before he had time to present it, he was struck a heavy blow, which fell upon his forehead. In the mean time he prepared his pistol, stepped back one or two paces, presented and discharged it while the deceased was in the act of giving the second blow. In regard to his conduct on this occasion he says:—

> Are the destinies of the weak to be suspended upon the volition of the strong? Does gigantic force authorize its possessor to doom to irreverable infamy, whomsoever it pleases? Most assuredly not. Under personal aggression, then, what measures are justifiable *to avoid disgrace?* What are permissible, *for the preservation of* HONOR? When the awful crisis arrives, which renders it necessary to

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as printed, is a gross imposition on the public: the friends of Selfridge having had almost the sole conducting of it. Mr. Dexter's plea is not as delivered in court."

Mr. Dexter's argument was made on Christmas day; and it may be here remarked as a curious coincidence, that on the *same day*, thirty-four years afterwards, his son, Franklin Dexter, made the closing argument in the defence of Mrs. Kinney, before the same court, charged with murder—a trial which excited little less interest than that of Mr. Selfridge. The argument of Mr. Franklin Dexter was scarcely inferior, in any respect, to that of his father. It may not be improper to mention, also, that at the last mentioned trial, Mr. Attorney General Austin, a cousin of Benjamin Austin, was opposed to Mr. Dexter, and a grave misunderstanding between those gentlemen took place, which we formerly noticed. (See 3 Law Reporter, 409.)

[1] A correct statement of the whole preliminary controversy between Thomas O. Selfridge and Benjamin Austin; also a brief account of the catastrophe in State street, Boston, on the 4th August, 1806: With some remarks, by Thomas O. Selfridge.

——————— "He takes my life,
When he doth take the means whereby I live."

Charlestown: Printed by Samuel Etheridge, for the author, 1807.

resist, or to succumb with dishonor, is it not a solemn duty, which every man owes to his friends, his country, and his God, to summon all his energies, and employ all his faculties, to avoid the *former*, and preserve the *latter?* And when, with a weapon, he supplies the deficiency of corporal strength, does he do any thing more than use such means as Providence has placed within his reach for defence? . . . . . How far one man may ruin the peace, destroy the character, and degrade the standing of another, is a question of the most serious import. Were a gentleman quietly to submit to a beating, he would be instantly shunned by the friends of his youth, and the companions of his age. When the blasting reproaches and ireful contempt of his former associates had exiled him from his accustomed scenes of business, and of pleasure, whither could he repair? What occupation could he pursue? Should he fly to the army, the last refuge of the desperate, what government would invest him with a command? What soldier would follow him in the day of battle? Philosophy may surmount the ordinary evils of life, death may be met with magnanimity, but "*a wounded spirit, who can bear?*" . . . . . The honor of a gentleman, should be as sacred as the virtue of a woman; but the female is authorized to take his life, who would violate her honor. Why is a man not bound to maintain his honor at the same hazard? The loss of virtue to a woman, is irretrievable ruin; so is the loss of honor to a man; and for the same reason in both cases, because they both lose their rank in society, and their estimation in the world.

Mr. Selfridge resumed the active duties of his profession in Boston. He was a man of the world, and had not that application to study, which is indispensable to the thorough lawyer. Possessed, however, of considerable natural abilities, he took a high rank as an advocate at the bar; and was in an extensive practice till his death which we believe took place about ten years after his trial.[1]

Many years have now elapsed since this exciting trial took place, and the feelings of bitterness with which it was attended are forgotten. The acquittal of Mr. Selfridge is generally regarded as correct by those who examine all the evidence in the case. Of the moral character of the transaction it is not for us to pronounce judgment. It was regretted by all, and by none more than by Mr. Selfridge and his political and personal friends. It must be placed in that class of deeds which are not amenable to the law, but upon the necessity or propriety of which, men will always entertain different opinions. Few will deny, that in such an affair the lot of the survivor is most to be regretted; and

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[1] We are informed by an old member of the bar that Mr. Selfridge's business increased after his trial. The docket of the Supreme Court at that period would seem to indicate a different result, although in a city, the court docket does not give a very accurate idea of the extent or value of one's business. It appears that at the March term 1806, before the catastrophe in State street, there were on the docket (old and new entries) 667 actions, in 72 of which Mr. Selfridge appeared for plaintiffs. At the March term, 1807, after the trial, there were 355 old actions, in 41 of which Mr. Selfridge was for plaintiffs. He made no new entries at that term. At the November term, 1807, of 317 old actions he was for plaintiffs in 19. He made three new entries at that term; the docket contained 254. At the November term, 1809, he was for plaintiffs in 22 actions out of a docket of 345. He made 19 new entries; the docket contained 386. At the March term, 1812, he was for plaintiffs in 28 actions out of a docket of 487. There were 156 new entries, of which he made three. At the November term, 1814, he appeared to be doing considerable business; he made eleven new entries, out of a docket of 158. At the March term, 1817, his name appears in two cases for plaintiffs; he made no new entries this year. It is probable he died before this time.

many will agree with Mr. Dexter, that it is a most serious calamity, for a man of high qualifications for usefulness, and delicate sense of honor, to be driven to such a crisis, yet should it become inevitable, he is bound to meet it like a man, to summon all the energies of the soul, rise above ordinary maxims, poise himself on his own magnanimity, and hold himself responsible only to his God. Whatever may be the consequences, he is bound to bear them, and stand like mount Atlas,

> "When storms and tempests thunder on his brow,
> And oceans break their billows at his feet."

RECENT AMERICAN DECISIONS.

Circuit Court of the United States, Massachusetts, October Term, 1840, at Boston.

Palmer *v.* Warren Insurance Company.

Words of exception in any instrument are to be construed most strongly against the party for whose benefit they are intended, and this rule is applied to words of exception in policies of insurance; but this rule of interpretation is subservient to another — *verba intentione non è contra, debent inservire.*

Policies of insurance are always construed liberally, and rarely, if it is possible, subjected to any critical strictness, or any technical interpretation.

Where a policy of insurance on time contained the following clause: "excluding during the term all ports and places in Mexico and Texas, also the West Indies, from July 15th to October 15th, 1839, each at noon," and the vessel did sail from New York for, and arrived at, St. Jago de Cuba, within the excluded period, and on her return, she was lost in December following; it was *held*, that the underwriters were liable — the clause in the policy being an exception or exclusion of *time*, and not of *voyages*, and the loss not happening within the excepted period.

Assumpsit on a policy of insurance. The case came before the court upon an agreed statement of facts, to the following effect: The plaintiff, on the first day of May, 1839, procured a policy of insurance to be underwritten by the defendants, in "two thousand dollars, on one half of the brig Spry, for the term of one year from this first day of May, 1839, at noon, excluding during the term all ports and places in Mexico and Texas, also the West Indies from July 15th to October 15th, 1839, each at noon; the brig valued at $45,000, at a premium of $11 per cent., to add one half per cent. each passage; her cargo is coal, stone or lime; or that she proceeds to or from a port in North Carolina, within Ocracock bar. The policy contained the usual risks and clauses in the Boston policies. The declaration was for a loss by the perils of the seas. It was agreed

by the parties, that the question as to the liability of the defendants should be decided by the court before the case was submitted to a jury on the merits.

The cause was argued by *Rufus Choate* for the plaintiff, and by *Theophilus Parsons* for the defendants.

Story J. The questions involved in the argument of the present case are of considerable novelty, and certainly are not unattended with difficulty. The policy is upon the brig Spry for a year, "excluding during the term all ports and places in Mexico and Texas, also the West Indies from July 15th to October 15th, 1839, each at noon." During the year 1839 the vessel performed a voyage from Boston to St. Joseph's, (Florida,) and from thence to the Havana, and thence to New York. On the 12th of September, 1839, she sailed on a voyage from New York to St. Jago de Cuba, arrived there about the first of October, and sailed from thence on her return voyage to New York on the 25th of October, and was wrecked on the 15th of December following on a beach in Eaton's bay, in Long Island sound. The loss, for which the suit is brought, is that occasioned by this shipwreck.

Now, upon this posture of the case, the question is, whether the Insurance Company are liable for the loss; and this depends upon the interpretation, which is to be put upon the terms of the policy. The loss occurred in the progress of the return voyage from the West Indies, within the year for which the insurance was made, and without the limitation of the time excluded by the policy (between July 15th and October 15th, 1839.) The terms of the policy are susceptible of various interpretations. The clause of exclusion may be construed, first, to be a condition or warranty on the part of the insured, that the brig, during the year, shall not be employed in any voyages to or from any port or places in Mexico, Texas, or to or from the West Indies between July 15th and October 15th; upon which construction it is clear, that the underwriters would not be liable for the loss, which has occurred. And this would be equally true, whether we should treat it as a case of non-compliance with the condition or warranty, or as a deviation from voyages insured. Or, secondly, the clause may be construed as allowing such voyages to and from Mexico, Texas, and the West Indies, during the excluded period, but exonerating the underwriters from all risks and liabilities for losses in in the course thereof; which in the events, which have happened, would be equally fatal to the recovery in this suit, since the loss was in the course of the voyage from the West Indies, which was begun, although not completed, within the excepted period. Or, thirdly and lastly, the clause may be construed, as merely excepting from the operation of the policy certain risks and losses, viz. all in ports and places in Mexico and Texas, and in the West Indies between July

15th and October 15th, 1839. In this last view, the policy would be completely operative, and cover the present loss, since it would not fall within the excepted risks. The defendants, in effect, contend, that the true import of the terms of the policy requires and justifies one or the other of the two first interpretations. The plaintiff, on the other hand, insists, that the third and last is the only true and sound interpretation. It has become the duty of the court, therefore, in a case, in which it is admitted on all hands, that there is no authority directly in point, to endeavor to ascertain, as far as it may, the real intentions of the parties in the language used, and to give such an interpretation as seems most consonant to that intention, and the general principles of law.

In the argument, it has been thought of some importance, in the construction of the clause, to ascertain, if there is any ambiguity in the language used, what is the rule of law, as applicable to this case, by which instruments of all sorts, and particularly policies of insurance, are to be construed. I take the rule to be clearly established, as a general rule, that words of exception in any instrument are to be construed most strongly against the party, for whose benefit they are introduced; and this rule has been expressly applied to words of exception in policies of insurance, as well in England as in this court.[1] *Verba fortius accipiuntur contra proferentem.* Now, for whose benefit are these words introduced? Clearly for the benefit of the underwriters, as they are to relieve them from risks, for which they would otherwise be liable under the general words of the policy. They are not, in form or in substance, the words of the insured; but words of exception, used by the underwriters, to exempt them from a liability from the general rule, which would otherwise attach upon them during the term of time, for which the policy was to endure. The language of the Supreme Court of the United States, in construing an exception in the policy of insurance in *Yeaton* v. *Fry*, (5 Cranch's R. 335,) is strongly in point as to the proper construction of the present policy. The court there treated the words of the exception as the words of the underwriters, and not of the insured, because they took a particular risk out of the policy, which but for the exception would be comprehended in the contract. So far, then, as the rule is to prevail upon the present occasion, it is unfavorable to the defendants. But it by no means follows, that it supersedes all other rules of construction; for there is another rule to be observed; *Verba intentioni, non è contra, debent inservire.*[2]

Another suggestion has been made, founded upon the grammatical sense of the words. It is said by the counsel on behalf of the plain-

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[1] *Blackett* v. *Royal Exchange Insur. Comp.* (2 Cromp. & Jer. 244); *Donnell* v. *Columbian Insur. Comp.* (2 Sumner's R. 380, 381); see also *The Earl of Cardigan* v. *Armitage*, (2 Barn. & Cresw. 197, 206); *Bullen* v. *Denning*, (5 Barn. & Cresw. 847, 850, 851.)

[2] Co. Litt. 36.

tiff, that the clause in question is to be construed as an exception, and, therefore, equivalent to "excepted risks." This is met on the other side by the remark, that the word used is "excluding," and not "excepting," and that, in a grammatical sense, to exclude means to shut out, and not to except; and, therefore, excluding is rather prohibiting. It is certainly true, that in lexicographies the word "exclude" has not ordinarily given to it, as one of its meanings, to "except." But nevertheless we shall find, that one of the senses given to the word "except" is to "exclude." And in common parlance, the words are often used as equivalents. Policies of insurance are generally drawn up in loose and inartificial language, and, indeed, in the language of common life, and therefore are always construed liberally, and rarely, if it is possible, subjected to any nice, or narrow, or critical strictness, or any technical interpretation. We look rather to the intent, than to grammatical accuracy in the use of language. If a policy of insurance were underwritten for a year on a ship, excluding the month of October, we should say, that it was but an exception of that month. If a policy was on all the cargo on board a ship, excluding the fruit on board, we should deem it a mere exception of the fruit. On the other hand, if the words were, excepting the fruit on board, we should as readily say, that the fruit was excluded from the risks stated by the policy. But in neither case should we say, that fruit was prohibited from being taken on board in the voyage. It does not appear to me, therefore, that any difficulty in the interpretation of the clause arises from any grammatical inaccuracy in the use of language. It will make no difference, in my judgment, in the present case, whether the word "excluding," in this policy, is interpreted in its more common sense of shutting out, or in the sense of "excepting," although I have no doubt, that the latter is the true and appropriate sense in the clause of the policy under consideration.

I confess, that I have felt some difficulty in arriving at a satisfactory conclusion as to the true and proper interpretation of this clause. I have no doubt, that the word "excluding" is not here used in any sense, which makes the clause amount to a warranty, or to a condition, or to a prohibition. The language does not, in my judgment, justify such a construction. It is not the fair import of the terms, and to arrive at it, we must force them out of their natural signification by an artificial straining. In *Yeaton* v. *Fry*, (5 Cranch R. 335, 341,) a similar attempt was made to construe an exception in the policy to be a warranty; but it was rejected by the Supreme Court of the United States. My difficulty is of another sort. It is, whether the clause amounts to an exception of *voyages*, or an exception of *risks*. Construe it, as an exception of voyages, and it will read, as if written thus; "Excepting during the term all voyages to and from all ports and places in Mexico and Texas, also the West Indies from July 15th to October 15th, 1839, each at noon." On the other hand construe it, as an exception of risks, and it will read as if writ-

ten thus; "Excepting all risks in all ports and places in Mexico and Texas, also in the West Indies from July 15th to October 15th, each at noon." After some hesitation, I have come to the conclusion, that the latter is the true and natural and easiest interpretation of the clause; and that it will satisfy the intention of the parties, so far as we can gather it from the words or apparent objects of the policy.

My reasons for this conclusion I will now proceed shortly to state. In the first place, it is a well known fact, that greater risks occur ordinarily in ports and places in Mexico and Texas, either from the character of the harbours, or that of the government, than in other ports. The same remark applies to the West Indies, during what are commonly called the hurricane months, which are between the middle of July and the middle of October. It is not unnatural, therefore, to expect, under such circumstances, either that such risks should be excluded, or that a higher premium should be paid. I entirely, therefore, accede to the argument, so strongly pressed in the present case, that the exception did cause a diminution of the premium, and without it the company would not have underwritten at all, or not without a higher premium.

The words, then, in effect, in my view, are words of exception or exclusion of what would otherwise be comprehended in the general terms of the policy. The policy is for the term of a year. The natural construction, then, of the exception is, that it excepts something already included. It is, then, an exception or exclusion of time, and not an exclusion of voyages; for no voyages are mentioned. The words are "excluding during the term." If the intention had been, in the first part of the clause, to exclude all voyages to or from ports and places in Mexico and Texas, we should naturally have expected the word "voyages" to be inserted in this very connection. But if it was intended only to exclude time, then the words stand well enough without any additional words, and their import is to exclude during the term the time in ports and places in Mexico and Texas. But even if this part of the clause should be construed to exclude voyages to and from Mexico and Texas during the year insured, it would not follow, that the other part of the clause is to receive the same interpretation. In the case of *Yeaton* v. *Fry*, (5 Cranch R. 335, 341,) the Supreme Court of the United States, upon a policy containing a clause, "all risks, blockaded ports and Hispaniola excepted," held the clause to be divisible, and applied the construction of it thus; that a voyage to Hispaniola was not insured; but a voyage to a blockaded port was, unless known to be blockaded, although it was in fact blockaded. The risk of loss from a known blockade was excepted, and not the voyage to the port itself. The same exposition might be applied here.

But as the brig did not, in fact, go on any voyage to Mexico or Texas, it is unnecessary to insist on that. We may read the clause, then, as if it were, "excluding during the term the West Indies from July 15th and October 15th, each at noon." Now, here it is clear,

that voyages to and from the West Indies are not excepted generally; but the West Indies for a specified time only. The natural interpretation, then, of this clause is, that it excepts from the protection of the policy the time passed in the West Indies from July 15th to October 15th. I say, this is the natural interpretation; for the insurance is for a year, the exception carved out of it is for three months, and these three months not universally, but only when the vessel is in the West Indies. If the vessel is not in the West Indies, the policy covers the whole term; so that West India ports or places or West India risks only seem within the construction of the clause of the policy. Suppose, the brig had sailed on a voyage to the West Indies on the first of July, and had been lost on the tenth of the same month; what words are there in the policy (supposing there to be no warranty, condition, or prohibition, which I have already said there is not,) which would prevent the owner from a recovery of the loss under this policy? I confess I can perceive none. The loss would be without the excepted period, and not within it. Besides; it seems to me, that policies on time are properly to have the same construction throughout, unless there be an irresistible presumption the other way. The very object of a policy on time is to avoid any designation of voyages, or chances of deviation; and to leave the party at liberty to proceed on any voyages or adventures he may choose. Exceptions, therefore, in the policy, if they admit of any other reasonable interpretation, ought not to be construed as cutting down the policy to particular voyages, excluding all others; but to be deemed exceptions of time and risks in particular ports or parts of voyages. Now, every word in the present policy is perfectly satisfied by the interpretation, which I have given to it, without any straining of the words from their ordinary meaning, as words of exception or exclusion. But if we construe the clause the other way, as excluding all voyages to and from the excepted ports in Mexico and Texas, and all voyages to and from the West Indies, begun before, or continued after the excepted period, we are necessarily obliged to interpolate many words into the clause, and to deflect the words from their common signification. In short, we are to construe a policy, purporting to be a policy on time, to be also a policy on voyages, and the exceptions to be, not of time and risks, but of voyages to and from the excepted ports and places, as well as an exception of the time passed in them. It appears to me, that this is not a reasonable or justifiable construction.

But, suppose the meaning of the excepted clause is ambiguous, and admits of either construction, which is then to be adopted? The rule already adverted to decides this. The exception is to be construed most strongly against the underwriters, and most favorably to the insured.

Upon the whole, therefore, notwithstanding I have had some difficulty, my mind on the whole reposes on the construction, which I have stated, as the true, the natural, and the appropriate meaning of the policy.

Supreme Court of Pennsylvania, December Term, 1840.

PARKER *v.* WELLS.

A parol contract for the purchase of land, is not taken out of the statute of frauds by mere payment of the purchase money.

THIS was an appeal from a decree of the common pleas of Delaware county, in the matter of the distribution of the proceeds of a sheriff's sale of a certain messuage and tract of land situate in that county, and sold by virtue of a writ of *venditiori exponas* in an action brought by Samuel Parker *v.* John Wells. The sheriff paid into court the sum of seven hundred dollars, which was claimed by two judgment creditors of the defendant; by Susannah Patterson, executrix of William Patterson, under a judgment against the defendant, entered on the 23d day of January, 1837; and by Charles Wells, under a judgment against the defendant, entered on the 19th of June, 1837.

The property from the sale of which the money arose, was conveyed to the defendant by Paschall Morres, the first of April, 1837. There had been a parol agreement for the purchase and sale of it between the parties on the previous autumn, by the terms of which, part of the purchase money was to be paid before the ensuing winter; it was not paid, however, and in December the defendant gave his note in lieu of it, which the purchaser had discounted in bank. The residue was paid on the first of April, 1837, when the conveyance was made. The defendant was in possession of the property previous to the agreement, under a lease which expired on the day of the conveyance.

On the ground that the defendant had, by payment of the purchase money, acquired an equitable title which might be bound by a judgment at law, the court below decreed in favor of the elder judgment creditor, though his judgment was obtained before the date of the conveyance, and though by the law of this state, after-acquired property cannot be so bound.

The cause was argued on an appeal to this court by *Dillingham* for the appellant; and by *Edwards* for the appellee; and the opinion of the court was delivered by

GIBSON C. J. It is not pretended, that possession was delivered on execution of the contract; but it is argued that the security given for the purchase money was equivalent to payment of it, and consequently enough to take the case out of the statute. Though there had been several dicta that nothing but delivery of possession is to be taken for part performance, it had not been directly decided in Pennsylvania before *McKee* v. *Phillips*, (9 Watts, 85,) that payment of purchase money is not so. Yet, notwithstanding several English de-

crees to the contrary, the opinion of the profession, drawn perhaps from some of the best text writers, had marshalled us the way to that conclusion. The English authorities are undoubtedly discrepant; but they justify what Mr. Justice Story seems, in his Equity Jurisprudence, ch. 18, § 760, to have feared would be considered a too positive assertion, that even in England the old doctrine had been overthrown. It is not a little singular that Mr. Roberts, when he wrote his treatise on the Statute of Frauds, which was published so late as 1805, considered this old doctrine to be firmly established; and it is not less so, that he mentioned *Pengall* v. *Ross*, (2 Eq. Ca. Abr. 46,) as the only case which militated against it; for many of the cases relied on by Mr. Justice Story and Sir Edward Sugden as establishing the contrary, were before that time; and they are corroborated by a multitude of dicta in later decrees. On the other hand, no American decision that I have discovered, contradicts them. Though Mr. Justice Thompson, while delivering the opinion in *Wetmore* v. *Morton*, (2 N. Y. Ca. in Error, 109,) repeats with seeming approbation, Lord Hardwicke's dictum in *Lacon* v. *Morton*, (3 Atk. 4,) that payment of purchase money has always been deemed part performance, it is evident from the fact of payment having in that case, been followed by possession and improvements, that he had not the question before us particularly in his view; indeed it belonged not to the case. Though the English statute of frauds has been adopted in practice or reënacted with modifications in almost every state of the union, it is wonderful how little is to be gleaned from the American decisions on this branch of it. On the facts of the case in *Davenport* v. *Mason*, (15 Mass. 93,) it is difficult to perceive how a question about part performance could be raised in it, as the money paid could certainly be recovered back without regard to the validity of the original contract, but there is no dictum in it in support of what I have called the old doctrine. *Bell* v. *Andrews*, (4 Dall. 152,) was an action to recover damages for a breach of the contract, which is not forbidden by our statute; and no more was determined in it than that payment of the consideration might be proved by parol. In the *Lessee of Billington* v. *Welsh*, (5 Binney, 130,) it was barely ruled that delivery of possession and payment of purchase money together, were enough to take the contract out of the statute without a word having been said about the supposed effect of payment alone. In *Jones* v. *Peterman*, (3 Serg. & R. 543,) which was the case of a lease and not a case of payment at all, the question had regard exclusively to possession at the time of the contract. It is true the chief justice, as he had done in *Smith* v. *Patton's Lessee*, (1 Serg. & R. 84,) mentioned the old distinction between purchase money and earnest, but in a way to leave it doubtful whether he considered either of them to be available. He glanced at the doctrine as it appeared to lie at the surface of the subject; but without a view to the present question, for it was not his habit to decide more than was in the case. The

judge who was associated with him, proceeded less cautiously, and maintained delivery of possession to be the criterion. It may be said, then, that before the decision in *McKee* v. *Phillips*, the question, in Pennsylvania, was an open one, but swayed towards the conclusions of the puisne judge in *Jones* v. *Peterman*, by a preponderating weight of authority, and by the opinions of such men as Mr. Justice Story, Chancellor Kent, Sir Edward Sugden, and Mr. Newland. But independently of authority, there is much reason to distinguish betwixt evidence of payment and evidence of the more notorious and solemn act of investiture which is less susceptible of perjury, the mischief against which the statute was intended to guard. And there is even more reason for a strict construction of the statute of Pennsylvania, which denies not the injured party an action for damages, than there is for such a construction of the British statute which declares the contract to be void and allows him no remedy whatever. But, in the case before us the purchase money was not even paid: for though the giving of a negotiable security be equivalent to actual payment in order to found an action for money paid or received, it is not so to found an equity; as may be seen in its insufficiency to constitute a purchaser for valuable consideration. The purchaser, here, might perhaps have recovered his money back; but on no ground could actual payment, and much less could a security for it, give him an equitable estate in the soil. The judgment recovered of him before the land was conveyed to him, was consequently not a lien on it; and the fund in court must be decreed to the next oldest judgment creditor; who is the opposing claimant.

Decreed accordingly.

District Court of the United States, Maine District, at Portland, February Term, 1841.

The Dawn.

The libellant shipped for a voyage from Boston to Turk's island. The ship soon after leaving port, was so much damaged by the fortune of the seas, that the master, for the safety of the lives of the crew, put into Bermuda, where a survey was called, and she was condemned and sold as a wreck, and her crew discharged. Wages were paid to the libellant until he arrived at Bermuda. By his libel he claimed either the two months wages allowed to seamen on the sale of a vessel in a foreign port, and the discharge of the crew, by the act of congress of February, 1803, chap. 63; or a sum in addition to his wages, to pay his expenses home.

Held, that the act of congress applies only to the case of a voluntary sale of a vessel, and not to a sale rendered necessary by misfortune, and that the libellant was not entitled to the statute allowance, but was entitled to a sum in addition to his wages to defray the expenses of his return home, to be paid from the proceeds of the sale of the vessel.

In case of shipwreck, the seamen are by the maritime law bound to remain by the vessel, and exert themselves to save all that is possible of the ship and cargo.

When they do this they are entitled to their full wages, without deduction, against the materials which they save of the ship, if enough is saved to pay them.

And they are entitled to a further reward, in the nature of salvage, against the whole mass of property saved.

Their claim is not as general or volunteer salvors, nor are they entitled to an equally large salvage; but they are entitled to a reasonable allowance, *pro opera et labore*, according to the circumstances of the case and the merits of their services.

When the disaster happens in foreign parts this ought not to be less than the expenses of their return home.

THIS case was before the court several terms ago, and is reported in Ware's Reports, 425. After the opinion was then delivered, the counsel for the respondent moved the court to suspend the decree, to enable the party to offer further evidence to show the actual condition of the vessel, when she arrived at Bermuda. Under the circumstances of the case, the court allowed the motion. The case was now presented on the new evidence. The material facts upon the whole case were as follows. The libellant shipped on board the brig Dawn, at Boston, November 26, 1836, as mate, for a voyage to Turk's island, for wages at twenty-five dollars a month. Soon after the brig left port she encountered violent gales, by which she was so much damaged in her hull and rigging, as to be incapable of continuing the voyage, and the master, for the safety of the lives of the crew, bore away for Bermuda, where she arrived on the 28th of December. The master then made his protest, and applied for a survey. Commissioners were appointed for that purpose by the governor, who after an examination reported, that from the great damage which the brig had received in her spars and rigging, and especially from the disabled state of her hull, connected with her great age, she was unfit for sea, and unworthy of repair; and she was subsequently sold as a wreck. The additional evidence, now introduced, went to confirm the report of the surveyors, and to prove the ruinous condition of the vessel, and to show further the great expenses of the repairs, which would be required to fit her for sea.

The crew were discharged, and paid their wages up to the time of the discharge. The libellant claimed in addition two months wages allowed by the act of congress of February, 1803, sect. 3, upon the sale of a ship and the discharge of her crew in a foreign port, or upon the discharge of a seaman in a foreign country, with his own consent; and if, under the circumstances of this case, he was not entitled to claim under the statute, an alternative claim was set forth in the libel for a reasonable compensation, in addition to his wages, in the nature of salvage for his extra labor and services in saving the vessel, and to pay his expenses home.

The case was argued by *C. S. Daveis* for the libellant, and by *T. A. Deblois* for the respondent.

WARE J. I do not think it necessary on this occasion to say much upon the claim for the statute allowance of two months additional wages, which are directed to be paid to the consul for the seamen's

use on the sale of a vessel in a foreign port, or when a seaman is discharged in a foreign country with his own consent. When this case was before the court at a former term, that question was fully considered, and the conclusion to which my judgment was brought, by that examination, was, that the statute applied only to the case of a voluntary sale of the vessel, and to a strictly voluntary discharge of a mariner, and not to a sale or discharge rendered unavoidable by an imperious and overruling necessity. But when a vessel is sold in a foreign port, the case is within the words of the statute, and if the owners would exempt themselves from its operation it belongs to them to show that the sale was involuntary on their part. As the evidence then stood, it did not appear to me that the necessity of the sale was sufficiently established by the proof; but, under the peculiar circumstances of the case, it seemed to be reasonable to suspend the decree, and allow the owner to offer further evidence to that point. The evidence now produced does in my opinion satisfactorily show that the sale was, in the reasonable meaning of the word, a sale of necessity. Not that it was physically impossible to repair the vessel and proceed on the voyage; for it is always possible to repair or rebuild a vessel, while any part of the hull remains. But the damages were so extensive, and the expense of the repairs would have been so considerable, that it was beyond question greatly for the interest of those, on whom the loss must ultimately fall, to abandon the voyage and sell the materials preserved for the most they would bring. A sale is within the mercantile and reasonable sense of the word necessary, when the vessel cannot be repaired, but at a great sacrifice of the interests of the owners. And when a voyage is broken up for such cause, the seamen are not properly discharged, but the whole enterprise is brought to a premature conclusion by a fortuitous event, for which neither party is responsible.

The other question raised by the pleadings in this case is, whether upon a shipwreck and loss of the vessel in a foreign country, the seamen, who have remained by the ship and faithfully performed their duty to the last, can, upon the principles of the maritime law claim, a compensation, out of the property which they save, beyond their stipulated wages up to the time, when their connexion with the ship is finally dissolved, sufficient to pay their expenses home. This question has been very ably and elaborately argued on both sides; and the authorities bearing upon it have been widely examined. But with all the researches of counsel no adjudged case has been found, in which the question has been directly and formally decided.

It is contended by the counsel for the libellant that this claim is founded on an ancient principle of the maritime law of Europe, incorporated into the earliest digests of the law, and recommended as well by the dictates of justice and humanity, as by an enlarged and enlightened public policy; that if it is not directly sanctioned by any judicial precedents, neither are there any by which it is directly negatived; but that there are cases in which a compensation in the nature of salvage may be allowed beyond the amount of wages due, is fairly infer-

rible from the doctrines of many of the adjudged cases; and it is in fact but a just application of the general principle of the maritime law, which studiously connects the interest of the crew with the safety of the vessel and cargo. On the other side it is argued that the claim cannot be supported as one flowing from the contract, all rights under that being satisfied by the payment of wages up to the time when the contract was dissolved by an accident of major force; that it cannot be maintained as a salvage reward, because the ship's company can, it is said, in no case claim as salvors, being bound by their contract to use, on these melancholy occasions, their utmost exertions for the preservation of the ship and cargo for their stipulated hire; and the silence of our jurisprudence on a question, which must have frequently been presented to the court, has been strongly urged as a proof that no such principle, as that contended for in behalf of the libellant, is acknowledged by the maritime law of this country. And it is further contended, admitting the rule of the maritime law to be that upon a shipwreck in foreign parts, the crew are entitled to claim against the savings from the wreck a sum sufficient to pay their expenses home, that this rule is superseded in this country by the acts of Congress for the relief of destitute mariners in foreign countries, requiring the consuls of the United States to provide for their return at the public expense. Such I understand to be the general tenor of the arguments at the bar.

I agree with the counsel for the respondent that by the maritime law, as it is received in this country, the seamen are bound to remain by the wreck, and contribute their utmost exertions to rescue as much as possible from the violence of the elements, so long as there is a reasonable probability of saving any thing without too much hazard of life. It is true that a different view is taken of the obligations of the crew by the most distinguished maritime jurists of France. Valin says, that in case of shipwreck the seamen are at liberty to abandon the ship, although he admits that his opinion is in opposition to the decision of the Judgments of Oleron, and the Ordinance of the Hanse Towns. The reason, he says, is, that in this case the owner is under no *personal* obligation to pay their wages or the expenses of their return home, and consequently if they refuse to aid in saving the property he has no cause of complaint.[1] Pothier maintains the same doctrine. By the accident of major force, he says, which prevents the continuation of the voyage, the parties are freed from their engagements, and the seamen are no longer under any obligation to continue their services.[2] Boulay Paty, without being very explicit, seems silently to acquiesce in the same conclusion.[3]

But notwithstanding the imposing authority of these great names, it appears to me that this doctrine is exposed to very grave objections.

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[1] Comm. sur Ordinance de la Marine, liv. 3, tit. 4, art. 9, vol. i. 704.
[2] Contrats Maritimes, No. 127.
[3] Cours de Droit Maritime, vol. ii. 230—1.

It is true indeed as a general principle, when the performance of a contract is rendered impossible by a fortuitous event, that the parties are freed from its obligations. And in this case the prosecution of the voyage having, by an accident of major force, become impossible, the seamen are undoubtedly discharged from the principal obligation of the contract, that of performing the voyage. But as incidental to that, they are bound at all times to exert themselves for the preservation of the property entrusted to their care. It would be singular if they were released from this collateral obligation on the happening of an event, which rendered it peculiarly necessary. It appears to be a duty resulting directly and necessarily from the nature of their engagement to render their utmost exertions on these occasions to save all that is possible for their employers. This duty is expressly enjoined upon them in nearly all the old maritime ordinances. The law is so stated by Abbot in his Treatise on Shipping, part 4, ch. 2, sect. 6. And so it has I believe been uniformly held in this country.[1] So long as these services are continued their right to wages under the contract remains in full force, and their lien against the fragment of the wreck which they preserve. But by abandoning the wreck they forfeit their wages, nor will their right be restored should the wreck be saved by other hands.[2]

But the question presented in this case is, whether the seamen can claim any thing beyond the full amount of wages up to the time of the actual termination of their services. It is quite clear that this claim cannot be maintained upon the common principles applicable to the contract of hiring. Having agreed to perform the service for a stipulated price, they cannot maintain a claim for extra compensation, although by some fortuitous event, that service may have been rendered more laborious, or have involved more danger than was anticipated. However just and reasonable such an allowance may, in some cases, be as a pure question of casuistry, it cannot be sustained upon any established and known principle of law. Do, then, the principles and policy of the maritime law furnish any ground for making an exception, in favor of maritime services, to the general rule of the common law? After an attentive consideration of the subject, and an examination of all the sources of information within my reach, I am brought to the conclusion, that, to some qualified extent they do; and I will now proceed to explain somewhat at large the grounds, upon which this opinion is founded.

No case was cited at the bar, in which this question has been decided, at least in the form in which it is presented in this case. There are, however, several, in which the general subject of the claims of seamen in case of shipwreck, against the fragments which they save, is considered. Chancellor Kent; in his Commentaries, in speaking of

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[1] 2 Peters, Ad. R. 395. 2 Mason, R. 337.

[2] 3 Kent's Comm. 196. *The Two Catherines*, (2 Mason, R. 347); *Pitman* v. *Hooper*, (3 Sumner, R. 67.)

shipwreck in connexion with wages, says, that "some of the decisions in this country seem to consider the savings of the wreck as being bound for the arrears of seamen's wages, and *for their expenses home.*" (3 Comm. 195.) Here the expenses home are spoken of as a charge on the wreck, in addition to the arrears of wages. And I refer to this paragraph, not so much as an authority in support of the doctrine, as to show that the idea, that the crew may be entitled to something, beyond their wages, is not such a novelty in our jurisprudence, as was supposed at the argument. In the case of the *Two Catherines*, (2 Mason, 319,) the vessel had performed her outward voyage and earned freight, and was wrecked, and the cargo totally lost on her return in Narraganset Bay, near her home port. The libel was framed with a double aspect, claiming in the alternative wages or salvage. The question, what was due to the crew, appears to have been elaborately argued at the bar, and was profoundly examined by the court. The conclusion of the court was, that no wages were due, but that the crew were entitled to salvage against the materials, which they had saved of the vessel. The court held that there was no principle of law which authorized the position that the character of seamen creates an incapacity to assume the character of salvors, and that the salvage should never be less than the amount of wages, which would have been due had no disaster happened, but may, according to the circumstances of the case, be more. (p. 332—340.) I am aware of the language used by the same learned judge, in delivering the opinion of the court in the case of *Hobart* v. *Drogan*, (10 Peters, 122.) But it does not appear to me to be inconsistent with the decision of this case nor to take from its authority.

In the case of *The Cato*, (1 Peters, Adm. R. 42,) the ship was lost at sea, and the crew taken from the wreck by another vessel. Part of the crew of *The Cato* assisted that of the salvor vessel in saving a portion of the cargo, and they were allowed to claim, as subordinate and auxiliary salvors, one half of the share that was allowed to the crew of the salvor ship. Judge Peters observed, in delivering his opinion in that case, that "the third article of the laws of Oleron has been produced, together with the commentaries upon it, to show that seamen saving from a wreck are entitled to a reward, when sufficient property is saved, beyond the amount of their wages. *I have,*" he says, "*never disputed the doctrine in cases to which it seemed applicable.*" In another part of his opinion he adverts to a previous decision he had made in the case of *The Belle Creole* upon a state of facts similar to those of *The Cato*, and says, "I do not exactly recollect by what rule I estimated the quantum of wages, I ordered to be paid out of the surplus to the officers and crew of *The Belle Creole*, but I think it was *beyond the amount of wages.*" I shall have occasion presently to remark particularly on the third article of the laws of Oleron, and it will be seen how it applies to the present case. The case of *The Catherine Maria*, (2 Peters, Ad. Rep. 424,) was that of a vessel foundered at sea. A part of the cargo was saved by the aid of another vessel, in which the crew was brought home. Salvage

was allowed to the crew of the salvor vessel, and the crew of the lost vessel were allowed their wages from the property saved, *which was part of the cargo*, not only to the time of the abandonment of the ship, but to the time when the goods were brought into port, and were taken into the custody of the marshal under the process of the court. In the case of *The Brig Sophia*, (Gilpin, R. 77,) the vessel was wrecked on her return voyage to Philadelphia, on the Capes of the Delaware. The cargo was entirely lost, but some of the spars and rigging of the vessel were saved. The seamen filed a libel against the relics of the vessel for their wages, and the mate a separate libel, claiming salvage. The court held that the claim for wages could not be sustained, on the ground that freight is the mother of wages, and that when the freight is entirely lost, no wages *eo nomine*, are due. But it was further decided, that although nothing could be recovered as wages, the seamen were entitled to claim as salvors, and that the amount, which would have been due as wages, had the disaster not happened, might be recovered as salvage. The libel of the seamen was therefore dismissed, and the mate recovered the amount of his wages under the title of salvage.

All these cases clearly sustain the principle, that the seamen, in the event of shipwreck, are entitled to claim, against the property, which they have saved, in the quality of salvors. It is true that in the case from Gilpin, this seems to be treated as a substitute for the claim of wages, and to be measured by the amount which would be due if the disaster had not occurred. In the other cases, it is clear that the court thought it might exceed that amount, and in that of *The Catherine Maria* more was in fact awarded. And if the claim is valid for salvage, it would seem, as in all other cases of salvage, it must be discretionary as to the amount, to be determined by the particular circumstances of the case. But all these cases are open to one general remark, which may be thought to detract something from their authority in support of the principle contended for in the case at bar; it is this, that it seems to have been tacitly assumed that the wages were lost by the calamity, which prevented the earning of freight, and therefore, if the seamen could not be rewarded for their services in the way of salvage, they could claim nothing. Undoubtedly it was formerly the doctrine of the English courts, that freight was the only fund out of which wages could be claimed, and of course when freight was not earned, no wages were due. (Holt, Law of Shipping, 275.) But that is now overruled in England,—*The Neptune*, (1 Hagg. R. 227,) and it was never received in this country but with material qualifications. Freight is indeed the natural fund for the payment of wages, and the seamen have a privileged claim against it. It is a right, which does not stand merely on a dry rule of positive law, but is derived from the nature of things, for it is in part the product of their own labor. But, by the maritime law, the ship is as much pledged for wages as the freight. When the interests of third parties are involved, as between underwriters, when the ship and freight are insured by separate policies, it would seem, upon principles of natural law, that the freight

ought first to be exhaused, and the vessel resorted to only as a subsidiary fund when the freight proved insufficient. This was the opinion of Emerigon,[1] and in a proper case the court may perhaps have the power of marshalling the funds to meet the claims of natural justice. But at all events, the seamen are to be paid their wages, when enough for that purpose is saved of the ship or freight. *Pitman* v. *Hooper*, (3 Sumner R. 60.) It is not pretended that these authorities establish the principle as a settled rule of jurisprudence in this country, that upon shipwreck, when part of the property has been saved to the owners by the exertions of the crew, they are entitled to an allowance in the nature of salvage beyond the amount of their wages. But to me they seem to prove at least, that the opposite rule is not established, and that the question is fairly open to be decided upon principle, and the authority of the general maritime law.

We will now inquire what grounds it has for its support in the general doctrines of that law. The policy of connecting the interest of the crew with the safety of the ship and cargo is deeply imbedded in the principles of the maritime law. The ship and freight are the only pledge they have for their wages. Their lien upon these and upon every part of them attaches as a privileged hypothecation *tota in toto et tota in qualibet parte*, or, as it has been emphatically expressed, to the last plank of the ship, and to the last fragment of the freight.[2] But this is the whole of their security. If the ship and freight are wholly lost, there is a total loss of wages; and though the ship may be lost on the most distant and inhospitable shore of the ocean, they are not only left pennyless to find their way home as they can, but when through many hardships they have arrived there, however long and perilous their service may have been, they have no personal claim against the owner, unless freight in the course of the voyage has been saved and put on shore. Upon the common principles of the contract of hiring service or labor the title of the laborer to his reward depends on the faithful performance of the service, for which he is engaged, and is not liable to be defeated by the accidents of fortune.[3] The principle which attaches the right to wages to the fortune of the vessel, or in other words, makes the right dependent on the successful issue of the enterprise, for which the men are hired, is a peculiar feature of the modern maritime law. No trace of such a principle is to be found in the Roman law, nor in the maritime legislation of the Eastern Empire, nor in that ancient compilation, which goes under the name of the Rhodian laws.[4] It owes its origin to the necessities and peculiar hazards, which maritime commerce had to encounter in the middle ages, when to the dangers of the winds and

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[1] Traité des Assurances, art. 17, sect. 11, 53.
[2] Jugemens D'Oleron, art. 3. Consulat de la Mer, ch. 132, (edition of Pardessus, 92.) Emerigon Des Assurances, ch. 16, sect. 11, § 2. *Pitman* v. *Hooper*, (3 Sumner, R. 50.)
[3] 2 Kent's Comm. 590—1. Pothier, Contrat de Louage, No. 423.
[4] Pardessus, Lois Maritimes, vol. i. p. 325, note 3.

waves, were added the more formidable perils of piracy and robbery. The principle having been then established, and found by experience to be favorable to the general interest and security of commerce, it has been preserved in the maritime jurisprudence of Europe, when the special necessities in which it had its birth have ceased to exist.

It is then to the maritime customs and usages of the middle ages, in which this restriction upon the right of wages had its origin, that we are to look for its nature and quality, as well as for any countervailing advantages to the seamen, by which this abridgment of the rights naturally resulting from their contract was compensated, and the scales of justice, which were made to incline in favor of the employer, were equitably readjusted. If we retain the harsher principles of the old law, it is but just that we should also preserve the temperaments, by which its severity and apparent injustice were mitigated.

The earliest monument of the maritime jurisprudence of the middle ages which remains, unless we except the Consulate of the Sea, is the Judgments of Oleron. The rule is there stated in these terms: "When a vessel is lost, in whatever place it may be, the seamen are bound to save all they can of the wreck and cargo. In this case the master shall pay them their reasonable wages, *and the expenses of their return home*, so far as the value of the thing saved is sufficient; and if he has not money enough, he may pledge the objects saved to bring them back to their country. If the seamen refuse to labor for the salvage, there is nothing due to them, and on the contrary when the ship is lost, they lose also their wages." (Art. 3.) The rule cannot well be more explicity declared than in this article. If the ship is totally lost, the seamen lose their wages; but, against the effects which their exertions have rescued from destruction, they have a claim not only for the full amount of their wages, for that I understand to be meant by their reasonable wages, but also for a further sum to defray their expenses home. Thus we see that in the very origin of the custom which restricted the right of seamen for their wages to the effects which they saved, it was connected with another of allowing them against these effects an additional reward for their labor in saving them.

The Judgments, or Roles, or, as they are more frequently called in this country, the Laws of Oleron, do not appear, at first especially, to have been sanctioned by any direct act of legislation. They are apparently a collection of maritime usages, to which custom had given the force of law; but they have at all times been referred to as of high authority by all the most commercial nations of Europe. They were the earliest digest of maritime law in the western part of Europe, and from the general wisdom and equity of their decisions, as well as from other causes, they seem, in one form or another, to have been early incorporated into the maritime jurisprudence of all the western nations of that continent. Being a work of French origin, they were received as common law in Aquitaine, Brittany, Normandy, and the whole extent of the Atlantic coast of France. In England they early

acquired nearly the same authority, from an opinion there entertained, that they were originally compiled and published by Richard I. in his character of Duke of Aquitaine, on his return from the Holy Land. In the latter part of the twelfth century they were adopted by Alphonso the Wise, King of Castile and Leon, and thus became the law of the northern coast of Spain.[1] They were at an early period translated and adopted as the maritime law of Flanders, under the names of the Judgments of Damme and the laws of West Capelle.[2] The third article above quoted is in its substance incorporated into the ordinance of Philip 2, of 1563. (Part 4, art. 12. 4 Pardessus, 24.) In the more northern countries, this code does not appear to have been received as common law; but the general principles and usages which it established, were incorporated into their own ordinances. The whole of the first twenty-five, which were the primitive articles, are transferred to the ordinance of Wisbuy, from the 15th to the 39th article. The seventeenth article of the laws of Wisbuy is almost a literal translation of the third of Oleron. The Hanseatic ordinance, without copying so closely the article of Oleron, arrives at nearly the same conclusion. In case of shipwreck, the crew are required to assist the master in saving the wreck and cargo, for an equitable compensation in salvage, to be taken from the wreck, and the merchandise, according to the judgment of arbiters. If the master has not money, he shall carry the seamen back to their country if they choose to follow him. But if the seamen do not assist, the master is not bound to pay them any thing, and those, who have not done their duty, are liable to corporal punishment. Where the ship perishes, the whole that is saved is pledged to pay the totality of the wages.[3] The law of Denmark requires the master and crew to save the ship and her rigging as well as the cargo, and a compensation shall be paid them according to the opinion of good men. On the other hand the freight due from the shippers on the merchandise saved, as well as the wages of the crew, shall be paid in proportion to the part of the voyage performed. The mariner who will not aid in saving the ship and cargo shall lose his wages, even what has been advanced, and be regarded as infamous.[4] The same rules are established by the laws of Hamburg. The crew are bound to exert themselves to save the vessel and cargo for an equitable recompense, and if they refuse their assistance, the master shall pay them neither their wages nor any thing else.[5] The law of Lubec substantially agrees with that of Hamburg. It requires the master and crew to exert themselves to save the vessel and cargo, and allows them an equitable compensation, to be determined by arbiters. He who does not assist, shall be paid nothing and

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[1] Pardessus, Collection des Lois Maritimes, Vol. 1, pp. 301 and 306. Vol. 2, p. 29. 1 Black. Comm. 418. 2 do. 423.

[2] Pardessus, Lois Maritimes, Vol. 1, ch. 9.

[3] Ordinance of 1614. Tit. 4, Art. 29, and Tit. 9, Art. 5. Ordinance of 1591, Art. 45.

[4] Code of Frederic II. 1561, Art, 24. Pardessus, Lois Maritimes, Vol. 3, p. 250.

[5] Statute of 1603, Tit. 17, Art. 1. 3 Pardessus 325.

shall besides be deprived of his wages.[1] The Prussian Law also enjoins the same duties upon the crew, and requires the merchant to pay them a liberal reward *honestum premium viri boni arbitrio.*[2] The maritime code of Charles XI. of Sweden, as well as several of the ordinances of the northern nations, prescribes particularly the course to be pursued by the master on these occasions. He shall first save the crew, then the rigging of the ship, and lastly the cargo, for the saving of which he shall employ the boat and the services of his crew, for an equitable compensation. When the ship and cargo are entirely lost, the master and crew can demand nothing that is due to them. But if they save of the wreck the amount of their wages, they shall be paid without deduction. No one shall have reward for a salvage who has not aided; and he who has saved effects, may detain them until he is paid.[3] And finally, the maritime legislation of Russia inculcates the same principles, imposing on the crew, the obligation of saving what they can from the wreck, and giving them an equitable compensation for the salvage.[4]

The French Ordinance of Marine of 1681, was framed upon a review of all the antecedent maritime legislation of Europe, improved and corrected, it is said, by information sought from practical men in every part of the continent. And so admirably was the task executed by the great man who digested it, that from its first publication, it was generally acknowledged as constituting in some sort the text of the commercial law of all nations. In this celebrated code we find the same principles established and confirmed. When the ship and merchandise is entirely lost it is followed by an entire loss of wages. But if any part of the vessel is saved, the seamen engaged for the voyage or by the month shall be paid their wages. If merchandise only is saved they shall be paid their wages in proportion to the freight received. But at all events they shall be paid for their days employed in saving the wreck and the effects shipwrecked.[5]

It is certainly a little remarkable, in passing to the southern coast of Europe, that we find but very slight traces of a custom that seems from the earliest times to have prevailed on the Atlantic coast, that of allowing to the crew something in the nature of salvage from the property they save from the wreck. There is one chapter in the Consulate of the Sea, from which perhaps a custom may be inferred of allowing to seamen the expenses of their return home, when the vessel is lost on a foreign coast. It provides that when a ship sails to the countries of the Saracens and falls into the hands of enemies, or is lost by the fortune of the seas, if the master receive no freight, he shall not be bound to pay the seamen anything. "The master, says the

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[1] Official Code 1586. Tit. 3, Art. 3. 3 Pard. 444.
[2] Code of the Duchy of Prussia 1620. Lib. 4, Tit. 12, Art. 3, § 3.
[3] Code of Charles XI. 1667, Part 5, ch. 2. 3 Pard. 170.
[4] Statute of Riga, 1672, Tit. 5, Art. 1. 3 Pard. 520.
[5] Liv. 3, Tit. 4, Art. 8—9. The same principles are preserved in the Code de Commerce, Art. 52—61.

Consulate, who by one of the causes mentioned, loses his vessel, is not obliged to furnish the means of passage nor provisions for the seamen till their return to a christian country, because he has lost all he had and peradventure more." (Chap. 228, edition of Pardessus, 194.) The reason given for exempting the master from the charge, in this case, leaves room for the conjecture, that if part of the wreck had been saved by the crew, they might by custom be entitled to some allowance from it. The law of Genoa provides, when any disaster happens to a Genoese vessel, that the crew shall be bound to remain with the master and assist in the salvage, and that the master shall provide for their board and pay them double wages while they are employed in this service.[1] This is all I have been able to find in the legislation of those countries which border on the Mediterranean, indicating the existence of such a custom; while the ordinance of Peter IV. of Aragon and Valentia by its silence seems to negative it. It allows the seamen their wages in these cases to the time of the expiration of their service, provided they exert themselves to save the wreck and cargo, but nothing more, and visits upon their refusal to aid the penalty of the forfeiture of all wages even of that, which has been paid in advance.[2]

From this review of the maritime legislation, and jurisprudence of Europe, and more particularly of the western nations of Europe, commencing with the judgments of Oleron in the twelfth to nearly the close of the seventeenth century, we find, either by positive ordinances or by immemorial usages having the force of law, one prevailing rule applying to the case of shipwreck upon the whole extent of the Atlantic coast. It required the ship's company, in case of disaster, to exert themselves to the utmost of their ability to save as much as possible of the ship and cargo, generally under the penalty for the refusal or neglect to perform this duty, of a forfeiture of wages, and in some cases of additional punishment; but restricting their claim for wages to the effects, which they save, and allowing them against those effects some reward beyond the amount of their wages stipulated by the contract. These principles seem to have been incorporated into the early law of every maritime state on the Atlantic coast, from the extreme west of the Spanish peninsula to Sweden, including the ports of the Baltic. Such a general concurrence, of itself, raises a strong presumption that they are, taken together, founded in justice and wisdom. But independent of the authority of general usage, these principles appear to me to have their foundation in just and enlightened views of public policy, their object being to connect the fortune of the crew with that of the vessel, and thus fortify the obligations of social duty by the ties of pecuniary interest. They are strongly maintained by Mr. Justice Story, in the case of the Two Catherines, before referred to. "In my judgment" says he, "there is not any

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[1] Statutum 1441, ch. 14. Pard. Vol. 4, 519.
[2] Ordinance of 1440. Art. 17, 5 Pard. 357.

principle of law, which authorizes the position, that the character of seamen creates an incapacity to assume that of salvors; and I cannot but view the establishment of such a doctrine as mischievous to the interests of commerce, inconsistent with natural equity and hostile to the growth of sound morals and probity. It is tempting the unfortunate mariner to obtain by plunder and embezzlement, in a common calamity, what he ought to possess upon the purest maxims of social justice." (2 Mason, 332). The rule which restricts the claims of seamen for wages, to the effects, which they save, is one of naked policy; but that which allows them against these effects some reward beyond their wages, seems to me to be founded in a principle of natural equity, that is, that when property has been rescued and saved to the owner from extraordinary perils by extraordinary exertions, the fund, which is thus saved, owes something to the hand which has preserved it. If it be said, that the services, by which it is saved, were due under the contract, the nature of that contract ought also to be considered. Upon principles of public policy, contrary to natural justice and the general law of the contract of hiring in all other cases, if the ship is totally lost without any fault of the mariner, he loses his entire wages. But if a mechanic is hired to build a house, and before it is finished, the building is destroyed by an earthquake, or burnt by lightning, he is not on this account the less entitled to his wages. (Dig. 19, 12, 59.) Or if workemen are employed to build a dike, and before the work is accepted by the employer it is destroyed, not from any fault of the workmen, but from the defect of the soil or any other extraneous cause, the laborer is still entitled to his hire. (Dig. 19, 2, 62). The loss in such cases falls upon the owner or employer; and justly, for the whole profits, on the successful issue of the enterprise, would have gone to him. It is not so with the seaman. He can be paid only from the fund, which he has brought home to the owner; and his compensation is made dependent on the accidents of fortune, as well as on his own fidelity. It is no more than a just compensation for this inequality of the contract, when by extraordinary exertions of skill and intrepidity, he has saved the fortune of his employer from extraordinary perils, that these labors should be acknowledged by some reward beyond his stipulated wages.

And the policy of the principle appears to me to be as clear as its justice. It is a reward held out to induce the crew to persevere and exert the utmost of their skill and courage, even beyond what a court might think itself justified in requiring under their contract, to save what otherwise would be irretrivably lost to the owner. If they can look to nothing beyond their wages they will naturally be inclined to relax their efforts, when enough has been saved for that purpose. They will also naturally turn their attention exclusively to saving that which is pledged for their wages, that is the ship, to the neglect of the cargo. An observation of Judge Peters, whose extensive experience as a maritime judge, entitles his opinion on subjects of this kind to great consideration, is well deserving of attention. In the case of the Cato he remarked — "There is a mistake, evidenced by some of the

counsel in this and other *salvage* cases, as to the principles regulating the payment of *wages* to the seamen in the cases of wreck. The old law was that they were payable only out of such parts of the wreck of the ship, her cables and furniture as were saved; but it was found that under this impression the mariners were occupied in saving those articles, from which they derived an advantage and to ensure this, they suffered the goods to perish. Modern authorities are clear that both ship and cargo or such parts as are saved are alike responsible; though it should seem that the old fund, to wit, the part of the ship's materials or furniture saved should be exhausted before the cargo be made answerable." The mind of Judge Peters seems to have been vibrating between wages and salvage. Sometimes he calls the claim by one name and sometimes by the other. It seems to me that the seamen in these cases have two distinct claims, one for wages and another for salvage. Their wages are to be paid exclusively from the materials of the ship, they being specially pledged for that purpose, and the full amount due is to be paid without deduction. But they have no claim for wages against the cargo, except for the freight due upon it. Their claim for salvage is against the general mass of the property saved, and, as in all cases of salvage, the amount is uncertain, depending upon the particular circumstances of the case.

Upon the whole, after the best consideration that I have been able to give to the subject, it appears to me that on these melancholy occasions the crew are bound to remain by the vessel and contribute their utmost exertions to save as much as possible from the wreck; that if this is done, they are always entitled to their full wages if enough is saved for that purpose; but if they abandon the wreck and refuse to aid in saving it, their wages are forfeited. But that they may not rest satisfied with saving what is merely sufficient to pay their wages, and may be induced to persevere in their exertions so long as the chance of saving any thing remains, the law, from motives of policy, allows them, according to the circumstances and merits of their services, a further reward in the nature of salvage. The wages are to be paid exclusively from the materials of the ship, but the salvage is a general charge upon the whole mass of property saved. It is not, however, intended to be said that they can claim as general salvors, that is as persons, who being under no obligation to the ship, engage in this service as volunteers, or that they are entitled to be rewarded at the same liberal rate. Such a rule might sometimes increase the hazards instead of contributing to the safety of commerce. A crew who had from any cause become dissatisfied with their officers, or owners, might be willing to see the vessel placed in danger at the risk of some personal peril to themselves, in the hope of obtaining a large reward for rescuing her. But they are to be allowed a reasonable compensation *pro opera et labore*, as the rule is laid down in many of the old ordinances *boni viri arbitrio*. If the disaster happens in a foreign country it ought to be at least a sum sufficient to pay the expenses of their return home. Such, I think, are the principles of the general maritime law. And

if they have not been directly and to their full extent sanctioned by any judicial decision in this country, the reasoning of the courts, in the cases which have been cited, appears to lead to the same conclusion.

But it was contended at the argument, whatever may be the doctrines of the general maritime law on this subject, that it has been superseded in this country by the acts of congress, which provide for sending home destitute seamen from foreign countries, at the public expense. The argument proceeds on the ground that the only motive for this allowance is to furnish the seamen the means of returning home. But the maritime law, as we have seen, places it upon a broader foundation, that of general commercial policy as well as the intrinsic equity of the claim. It never could have been the intention of these statutes, made for the benefit and relief of seamen, to abridge any of the rights derived from their service under the general maritime law. They have their origin in a great principle of public policy, that of preserving to the country the services of this most useful but most improvident and often destitute class of citizens.

The case at bar was not one of absolute shipwreck, but rather what has been called *semi naufragium*. The vessel was brought into port in so damaged a condition and requiring so large an outlay in repairs to refit her for sea, that for the interest of the owner she was sold as a wreck. Between the owners and the crew she must be considered for the purposes of this case either as a wreck, or not a wreck. Upon the latter hypothesis the sale must be considered as voluntary, and then the two months wages under the statute will be due. On the other, the principles of the maritime law will apply. Between the owners and the crew, it appears to me in the present case, that the true measure of justice will be to consider her to be what the owners treated her as being, a wreck. And as the libellant faithfully performed his duty so long as his service was required, he is entitled to the benefit of the rule that in addition to his wages the master shall provide for his expenses home. I shall allow for this purpose one month's additional wages.

Supreme Judicial Court, Maine, April Term, 1841, *at Portland.*

WATERHOUSE *v.* MAXWELL.

Who may take advantage of a fraudulent deed.

TRESPASS for cutting timber on the plaintiff's land. The defence was, that the defendant acted under a power of attorney from the plaintiff's grantor, and that at the time of the conveyance, the grantor was *non*

compos, and that the deed was fraudulent. At the trial the judge ruled out this evidence, and a verdict was taken for the plaintiff. The defendant filed exceptions to the ruling of the judge.

Willis and *Fessenden* for the plaintiff.

Smith and *Bradford* for the defendant.

EMERY J. delivered the opinion of the court which overruled the exceptions; none, except those claiming under a grantor, or creditors, can contest the deed which he may have given. Heirs cannot take advantage of a fraudulent deed, nor the grantor himself.

Judgment on the verdict.

BANK OF PORTLAND *v.* FOX.

A mortgagee may sue the mortgage note at any time before the expiration of the right of redemption.

THE plaintiff, as mortgagee of the defendant, entered upon the mortgaged premises for breach of the condition of the mortgage; and afterwards, before foreclosure, commenced the present action upon the note secured by the mortgage. The defence was, that the entry for breach of the condition was a satisfaction of the note to the value of the mortgaged premises; and the defendant claimed a right to show that the property was worth the amount of the note. The defence was overruled at the trial and exceptions taken.

Longfellow for the plaintiff.

Codman and *Fox* for the defendant.

SHEPLEY J. delivered the opinion of the court, that a mortgage was not payment or satisfaction of a debt so long as the right of redemption remained open. Until a foreclosure, the possession may be defeated by the payment of the debt and the mortgagee may maintain an action upon the mortgage note at any time, before the expiration of the right of redemption.

DENNETT ET UX *v.* DOW.

This was an appeal from the judge of probate approving a will. The decree was reversed in this court, and both parties moved for costs. The court decided, that although they had a discretionary power to award cost in cases like the present, the circumstances of the present case would not justify them in awarding it to either party; the defendant had a decree in favor of the will in the probate court, from which the plaintiffs appealed; he could not, therefore, properly avoid coming into this court, and it would not be reasonable to submit him to costs in the discharge of this duty. To compel the plaintiffs, the prevailing party, to pay cost, would not be to exercise a sound discretion. Both motions overruled.

Fessenden and *Deblois*, and *W. P. Fessenden* for the plaintiffs.

Preble for the defendant.

Drinkwater v. Portland Marine Railway.

Liability of individual stockholders in incorporated companies.

The plaintiff's stock in the marine railway was attached on a writ, *Marwich* v. *Georgia Lumber Company*, of which the plaintiff was alleged to be a stockholder. The Georgia Lumber Co. was a corporation established by the state of Georgia, and recognised by a law of Maine; by the charter the private property of the stockholders is liable for the debts of the corporation: to secure a debt against the company this attachment was made, and that suit is still pending in court.

Preble for the plaintiff.

Willis and *Fessenden* for the defendants.

Per Curiam. The property of a stockholder cannot be attached and held on mesne process, in a suit against the company. The creditor must first obtain his judgment against the corporation, before he can pursue his remedy against the individual stockholders. The plaintiff's interest in the marine railway was therefore wrongfully attached, and judgment must accordingly be rendered against the defendants.

Haskell and another v. Whittemore.

The purchaser of a promissory note of hand from one who did not know it was without consideration, may maintain an action on it; although the purchaser knew all the facts.

Assumpsit on a promissory note by an indorsee. The note was originally without consideration, and was transferred by the payee to a third person for a valuable consideration and without knowledge of the original transaction. From his hands it passed, before it became due, to the plaintiffs for value, one of whom knew that it was given without consideration, the other did not. It was contended by the defendant that the note was void, and especially in the hands of the plaintiffs, one of whom knew of the original defect. Judgment was rendered for the plaintiffs.

Willis and *Fessenden* for the plaintiffs.

Codman and *Fox* for the defendant.

Shepley J. delivered the opinion of the court. The first indorsee being an innocent purchaser, had a legal right to recover the amount of the note; he could negotiate it, and the maker could not impair that right by giving notice that it was made without consideration; nor would he be injured by a transfer to one having a full knowledge of the facts; for his position would not be more unfavorable than before. If the relation between the maker and holder only were to be considered, the want of consideration would be a good defence to a holder who had purchased with notice; but purchasing of one who had no notice he must be considered to be in the same situation and entitled to the same protection.

DIGEST OF AMERICAN CASES.

Selections from 8 New Hampshire Reports.

AGENT.

Where one furnishes an agent with money to make a purchase, and the agent purchases the goods on credit, the principal is not liable to the vendor, notwithstanding the goods have come to his use, unless he had previously allowed the agent to purchase on credit, and thus authorized the vendor to trust him. *Boston Iron Co.* v. *Hale*, 363.

ARBITRAMENT AND AWARD.

1. A report of referees made under a rule of court, is, when presented for acceptance, open to every objection, whether the grounds of the objection appear on the face of the report or not. *Adams* v. *Adams*, 82.

2. The question, whether a particular demand was within the submission, is a question, the final decision of which belongs to the court. *Ib.*

3. It is a valid objection to an award, that the referees have taken into consideration matters not submitted to them, and founded their report in part upon such matters. *Ib.*

4. And if in such a case they award a gross sum, and do not state the grounds on which the award is founded particularly, so that the court may see what is awarded on account of demands that are within the submission, the whole award is void. *Ib.*

5. Where an award is vitiated by being founded in part on demands not submitted, but which one of the parties had improperly laid before the referees, the court will not recommit the case to the referees, in order that the report may be amended, on the motion of such party. *Ib.*

6. Awards must be certain and intelligible; and where the controversy is as to lines of land, in order to be conclusive as to the issue, should be so distinct that an officer may be able to give possession of the premises, and designate its limits by metes and bounds. Any award in such case short of this will be void. *Aldrich* v. *Jessiman*, 516.

7. When arbitrators have once made an award, their office is at an end. They cannot afterwards correct mistakes by a new award, or explain it by affidavit. Any construction given to it must rest on what is apparent in the original award. *Ib.*

ASSUMPSIT.

Where any person is arrested for a just cause, and by lawful authority, for an improper purpose, any money he may pay for his enlargement may be considered as paid by duress of imprisonment, and may be recovered back in an action for money had and received. *Severance* v. *Kimball*, 386.

ATTACHMENT.

Where an officer makes a nominal attachment of goods, receiving the receipt of a third person for an amount sufficient to satisfy the demand, and returns an attachment upon the writ, it is not competent for the receipter to contest the attachment, or set up a want of consideration. *Morrison* v. *Blodgett*, 238.

BAILMENT.

1. Where the owners of a stage coach employ a driver under contract that he shall receive a certain sum of money per month and the compensation which shall be paid for the carriage of small parcels, the owners are answerable for the negligence of the driver in not delivering a parcel of that description, entrusted to him to carry, unless this

arrangement is known to the proprietor of the goods, so that he contracts with the driver as principal. *Bean* v. *Sturtevant*, 146.

2. Where one receives goods upon a contract, by which he is to keep them a certain period, and if in that time he pays for them he is to become the owner, but otherwise he is to pay for the use of them, he receives them as a bailee, and the property of the goods is not changed until the price is paid. *Sargent* v. *Gile*, 325.

3. If a bailee for hire, for a limited period, sell the goods before the expiration of the term, the bailment is thereby ended; and the owner may maintain trover, if the vendee refuses to deliver them up on demand. And it will not alter the case, if the bailee had, by his contract, a right to purchase the goods within the term, by paying a certain price. *Ib.*

4. Where a traveller, after arriving at an inn, placed his loaded wagon under an open shed, near the highway, and made no request to the innkeeper to take the custody of it, and goods were stolen from it in the night; it was *held*, that the innkeeper was not liable for the loss, notwithstanding it was usual to place loaded teams in that place. *Albin* v. *Presby*, 408.

BILLS AND NOTES.

1. Where a draft has been protested for non-acceptance, the holder is not bound to present it at maturity, for payment. *Exeter Bank* v. *Gordon*, 66.

2. Where an agent receives the negotiable note of a third person from his principal, with authority to collect and apply the proceeds to the payment of a debt due from the principal to the agent, if the contents of the note are lost by the fraud or negligence of the agent, it will operate as a payment of the debt of the principal. *Ib.*

3. But if in such a case the agent, by a compromise, on the whole advantageous to all parties, release the third person on receiving one half the debt, in such a case the release will not operate as a payment of the debt of the principal beyond the amount received by the agent, although the compromise was made without the authority of the principal. *Ib.*

4. Where a creditor charged his travelling and other expenses, incurred on a journey made for the purpose of collecting a debt, which expenses were included in a new note given by the debtor,—*held*, that the note to this extent was without consideration. *Bean* v. *Jones*, 149.

5. But where each note was subsequently voluntarily paid by the debtor, —*held*, that an action would not lie to recover the same back. *Ib.*

6. A note payable to order may be assigned by delivery without endorsement; but such assignment is invalid except made by the rightful holder, or by his authority. *Davis* v. *Lane*, 224.

7. Where, on the decease of a promisee of a negotiable note, the note was taken without endorsement and in fraud of the estate to the promissor, and he paid it, *held*, that the payment did not avail against the administrator, and suit was maintained in his favor for the original consideration of the note. *Ib.*

8. In a suit, by the endorsee of a note against the maker, where the defence set up is that the note was endorsed after it was discredited, and is therefore liable to any defence existing before the assignment, the burthen of proof, as to the time of the endorsement, rests upon the maker of the note. *Burnham* v. *Wood*, 334.

9. The ordinary presumption is that the note was endorsed within a reasonable time of the date of the note, unless the contrary is proved; and this presumption is the same, whether the note is specially declared on, or is offered in evidence under a general count for money had and received. *Ib.*

10. A covenant not to sue one of two or more joint and several promissors, who are principals on a note, will not operate as a release to discharge the other promissors. *Durell* v. *Wendell*, 369.

11. Where L as principal, and S as surety, gave a note to A, and L having died the payee neglected to exhibit the note to L's executor within two years from the grant of administration, it was *held* that the surety still remained liable, and having paid the note was entitled to recover the amount of the executor. *Sibley* v. *McAllaster*, 389.

12. If the maker of a note, which is not in its nature assignable without his consent, when notified by a third person that it has been assigned to him by the payee, make no objection, his si-

lence in this respect is to be considered as an assent to the assignment. *Clement* v. *Clement*, 472.

13. Where a promissory note was signed by one as principal, and another as surety, evidence that the creditor, upon a request by the surety that he would collect the debt, said that the principal had paid a part, and was making arrangements to pay the residue, and that he should not call on him for the note, or words to that effect, is not sufficient to discharge the surety. *Mahurin* v. *Pearson*, 539.

BOND.

1. Where a bond has been once rejected by the obligees, a re-execution is not required to render it valid in the hands of the obligees by an after acceptance. *Pequawkett Bridge* v. *Mathes*, 139.

2. The alteration in an instrument after delivery, made by the obligee, or a stranger, to affect its validity must be material. *Ib.*

3. Where the whole penalty of a bond has become a debt, which the obligors unjustly detain, the obligee is entitled to recover interest upon the penalty, during the time it was detained. *Judge of Probate* v. *Heydock*, 491.

4. The sureties in an administration bond are liable for the proceeds of lands in another state, with which the principal has been charged on the settlement of his administration account in this state. *Ib.*

5. Where an action is commenced on an administration bond, and a breach of the condition is found, or admitted, execution may be awarded, upon a hearing in chancery, for money, the nonpayment of which could not have been given in evidence to support the action at law. Thus—

6. Where an action was brought in the name of the judge of probate, against an executor and his sureties, and a breach of the condition was acknowledged, and a motion made to be heard in chancery, after which the executor's account was settled in the probate court, and he died—it was *held*, that the administrator *de bonis non* had a legal claim to the balance left in the hands of the executor, on such settlement, and might have execution for it, or so much of it as the bond was sufficient to cover, on the hearing in chancery, (unless it was shown that it had been reduced by farther payments in the course of the administration,) and that no decree of the judge of probate ordering such balance to be paid to the administrator *de bonis non* was necessary, under such circumstances, for that purpose. *Ib.*

7. An administration bond is not discharged by an accounting for moneys to the amount of the penalty. Payments made by an executor, or administrator, in the due course of administration, are to be applied to diminish the balance in his hands, and the bond stands as a security for such balance. *Ib.*

CASE.

Where A, finding the sheep of B in A's close, drove them out of the close and then drove them away to a considerable distance, to the injury of B—it was *held*, that the driving of the sheep away was a wrongful act, which made A a trespasser *ab initio*, and amounted to a conversion of the property; but that B might waive the trespass and conversion, and recover for the damage sustained, in a special action on the case. *Gilson* v. *Fisk*, 404.

CHANCERY.

1. A special performance of a parol agreement for the sale of land, may be decreed in equity, when the agreement is admitted, unless the party insists upon the benefit of the statute of frauds. *Newton* v. *Swazey & a.* 9.

2. And a part performance of such contract will take it out of the statute. If the vendee, with the assent of the vendor, enters into the land and makes improvements, it will constitute such part performance. *Ib.*

3. A bill for specific performance may be maintained against the heirs of the vendor. *Ib.*

4. A resulting trust may be raised, rebutted, or discharged by parol evidence. *Page* v. *Page*, 187.

5. Where P bought land and took a deed in the name of L, and L advanced the purchase money and took the notes of P for the same, and agreed to convey the land to P on being repaid the money advanced, and interest—it was *held*, that the money thus advanced by L might be considered as a loan to P, and the land as purchased with the money of P so as to raise a resulting trust. *Ib.*

6. In general, where there is a resulting trust in lands, whoever purchases the land of the trustee, with the notice of the trust, becomes a trustee. *Ib.*

7. But this rule does not apply when the land is purchased of the trustee with the assent and at the request of the *cestui que trust*. *Ib.*

8. When the facts charged in a bill in equity are fully denied in the answer, there can be no decree against the answer on the evidence of a single witness, without corroborating circumstances to supply the place of a second witness. *Ib.*

9. When a father purchases land in the name of a son, no trust will in general result, but the conveyance to the son will be deemed an advancement. *Ib.*

10. After the filing of a general replication to a plea in chancery, nothing is in controversy but the truth of the matters alleged in the pleadings, and it is then too late to except to the sufficiency of the plea. *Bellows* v. *Stone*, 280.

11. If the defendant's pleading does not contain a full answer to the matters alleged in the bill, the course is to except to its sufficiency, and not to reply. *Ib.*

12. Where circumstances are stated in the bill, which if admitted to be true would be evidence to avoid the bar attempted to be set up by the plea, it is necessary to negative such circumstances by general averments in the plea, and to support the plea by an answer containing a particular denial of them. *Ib.*

COMMON LAW.

The body of the common law, and the English statutes in amendment of it, so far as they were applicable to our institutions and the circumstances of the country, were in force here upon the organization of the provincial government; and they have been continued in force by the constitution, so far as they are not repugnant to that instrument, until altered or repealed by the legislature. *State* v. *Rollins*, 550.

CONTRACT.

1. A verbal promise by the vendee, as part of the consideration for the conveyance of a tract of land, that he will pay the vendor whatever he may receive over a certain sum upon a re-sale of the land, is valid, and the money may be recovered in an action of assumpsit, notwithstanding the deed contains an acknowledgment that the consideration has been paid. *Hall* v. *Hall*, 129.

2. Where a contract was made payable in labor within the year, to be rendered on articles furnished to be manufactured by the plaintiff, *held* that such articles must be furnished seasonably for the manufacture of them within the time assigned in the contract, otherwise the defendant would be discharged from all liability for the performance of such labor. *Clement* v. *Clement*, 210.

3. Where a party gave a written promise to pay a certain sum in one year, for a clock, or interest on the sum, and the clock uninjured; and the writing purported to have been made at the town where the promisor resided, the promisee living in another state; *held*, that the place of performance was the house of the promisor; that he had an election to pay the money, or deliver the clock and pay the interest, and that no action could be sustained until after a demand, or evidence that the promisee was ready to receive performance at the place, or that the defendant was unable to perform the contract. *Barker* v. *Jones*, 413.

CORPORATIONS.

1. A corporation, created by the laws of another state, has power to take and hold lands in this state. *Lumbard* v. *Aldrich*, 31.

2. A vote of a corporation to authorize an agent to convey lands must specify the tract to be conveyed, or give some description by which it can be ascertained. A vote that the agent be authorized to execute two deeds of pieces of land in C, one to A, and another to B, is uncertain and insufficient. The power of attorney ought to be as certain as it is necessary for the deed to be which is to be executed under it. *Ib.*

INTELLIGENCE AND MISCELLANY.

The Bench and Bar in Illinois. We have recently received a communication from a gentleman who went from New England and has established himself in Illinois, in which he says an important change was made in the judiciary system of that state by the last legislature. The old system consisted of a supreme court of four judges, and a circuit court of nine judges. The circuit court was abolished, and five judges were added to the supreme court, and a judge of the supreme court assigned to each circuit, in addition to his duties as a judge of the supreme court, which sits twice a year, and once during the session of the legislature, as a council of revision, in connection with the governor. "This was a party movement, openly avowed, for the purpose of settling two or three party questions, such as the naturalization question, &c., and to remove certain obnoxious judges, two of them whigs and one a democrat. Four of the old circuit judges were put upon the new bench, and two of them had previously resigned. The judge of our circuit is S. A. Douglass, a youth of 28, who was the democratic candidate for congress in 1838, in opposition to Stuart, the late member from this district. He is a Vermonter, a man of considerable talent, and in the way of despatching business, is a perfect "steam engine in breeches." This despatch is the only benefit our circuit will derive from the change. He is the most *democratic* judge I ever knew. While a case is going on, he leaves the bench and goes among the *people* and among the members of the bar, takes his cigar and has a social smoke with them, or often sitting in their laps, being in person, say five feet *nothing*, or thereabouts, and probably weighing one hundred pounds. I have often thought we should cut a queer figure, if one of your Suffolk bar should accidentally drop in. After all, however, we are a considerably civilized set at the —— Bar, eighteen of us, about one third of whom are Yankees, and the eldest of us only about forty years old. There is much less civilization in the other counties of this circuit, eight in number. Our practice is very different from the New England practice. I like it in many respects better, and in others not so well. It is fast improving, like every thing else about us, making rapid strides, in fact."

Lord Thurlow. It is related of Lord Thurlow that when his patent of peerage was registered at the heralds' college, the herald begged to know the name of his lordship's mother? The reply was delivered in a voice of thunder, "I cannot tell!"

It is stated in Lardner's Cyclopedia, that Lavater, on seeing a picture of Lord Thurlow, examined it for a moment, and said, "whether this man be on earth or in hell I know not; but wherever he is, he is a tyrant, and will rule if he can.

Lawyers in Naples. In Michael Kelly's memoirs it is stated, that there are twenty thousand lawyers in the kingdom of Naples, most of them younger branches of the nobility; and there is no nation in which so many lawsuits are carried on.

MONTHLY LIST OF INSOLVENTS.

Boston.	
Davis, Ambrose, } Collomore, George W. }	Traders, Copartners.
Dickinson, Dexter O. } Sweet, William L. }	Merchants, Copartners.
Hayward, George A.	Shoe-dealer.
Melville, John,	Provision-dealer.
Meyer, Borchart,	Merchant.
Nettleton, Charles L.	Trader.
Clark, Uriah J.	Broker.
Hastings, Ebenezer G.	Laborer.
Cambridge.	
Newell, Frederic R.	Cabinet mak'r.
Charlestown.	
Kimball, William W.	Master mariner.
Concord.	
Wetherbee, Charles R.	Trader.
Lowell.	
Barratt, John S.	
Davis, Abram B.	Manufacturer.
Russell, Israel D.	Trader.
Sawtell, Isaac.	
Medford.	
Barker, William S.	Trader.
Marlborough.	
Cunningham, Jona. B.	Mason.
Howe, William,	Yeoman.
Middleborough.	
Burgess, Cornelius S.	Carpenter.
Milford.	
Chapin, Adams,	Cordwainer.
Newton.	
Henry, William,	Paper maker.
New Bedford.	
Parsons, John,	Trader.
Roxbury.	
Briggs, Cornelius,	Cabinet Manufacturer.
Southborough.	
Stow, Samuel D.	Laborer.
South Hadley.	
Merchants, Elihu B.	
Springfield.	
Rice, Charles W.	Carpenter.
Stow.	
Brooks, Isaac,	Gentleman.
Wilbraham.	
Hancock, Lumbard L.	
Watertown.	
Pierce, Otis,	Teacher.

NEW PUBLICATIONS.

Reports of cases argued and determined in the Superior Court of Judicature, of New Hampshire. Volume VIII. Concord: Marsh, Capen, Lyon & Webb, 1840. We have received the third part of this volume, and have given an abstract of some of the important decisions in our digest of cases in the present number. The present volume commences with the July term, 1835, in Grafton, and ends with the December term, 1837, in Rockingham. The decisions of the superior court of New Hampshire, compare favorably with those of other states, and the reputation of the bar there has always been high. There are three men now living, either of whom is scarcely equalled in the whole country, who received their legal education and commenced their career of fame amid the hills of the granite state. What need to mention the names of Daniel Webster, Jeremiah Mason and Jeremiah Smith?

We understand that Mr. Scammon, the reporter of Illinois, who lost nearly all the copies of the first volume of his reports by fire recently, is now reprinting it in Philadelphia. The second volume is also nearly ready for the press.

A second edition of Williams on Executors, with notes, by Francis J. Troubat, has been published in Philadelphia.

*** To our Readers. Some complaints have come to our ears in relation to the non-reception of all the numbers of the last volume of the Law Reporter. Our readers are aware, that the work passed into the hands of new publishers at the commencement of the present volume; and we would call the attention of those aggrieved by the negligence of the old publishers, to the advertisement on the third page of the cover.